



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 08 2016

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable James Lankford
Chairman
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your November 20, 2015, letter and the opportunity to respond to the questions for the record from the Senate Committee on Homeland Security and Governmental Affairs' hearing on November 5, 2015, entitled *Agency Progress in Retrospective Review of Existing Regulations*. Enclosed are our responses to your questions.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may contact Thea Williams, in the EPA's Office of Congressional and Intergovernmental Relations, at williams.thea@epa.gov or at (202) 564-2064.

Sincerely,

A handwritten signature in black ink, which appears to read "Nichole Distefano".

Nichole Distefano
Associate Administrator

Enclosure

**Post-Hearing Questions for the Record
Submitted to Mr. Bill Nickerson
From Senator James Lankford**

**“Agency Progress in Retrospective Review of Existing Regulations”
November 5, 2015**

On Reviewed Regulations

1. The EPA began a new review process to streamline Significant New Alternatives Program (SNAP) reviews of potential alternatives to ozone-depleting chemicals that manufactures could use in consumer products (such as aerosol cans, adhesives, cleaning solvents, refrigeration, and air conditioning systems). The EPA estimates that these efforts could reduce EPA’s review time for SNAP submittals from an average of 65 weeks to an average of 19-24 weeks (a 60%-70% improvement). While I applaud this result, why was this streamlining process not begun earlier?

RESPONSE: The EPA continually looks for ways to improve the efficiency of our programs. Over the past 20 years, the SNAP program has reviewed over 400 alternatives considering such factors as flammability, toxicity, local air quality impacts, ecosystem effects, occupational and consumer health and safety impacts, ozone depletion potential and global warming potential. On the basis of those assessments, the EPA has issued 20 rulemakings and 30 notices to facilitate the introduction of lower risk alternatives into the marketplace. Additionally, our participation in the Lean Government program provided an opportunity to streamline our program and achieve significant benefits for both the agency and our stakeholders. For more information about the Lean government program visit www.epa.gov/lean.

2. In February 2014 EPA issued a final rule that established a framework for collecting hazardous waste shipment data electronically, replacing a burdensome paper manifest system that requires six-copy forms to be completed, carried and signed manually. Why did the EPA wait until 2014 to finalize a rule that eliminated the requirement for a six-copy form that needed to be completed manually?

RESPONSE: The EPA issued its final regulation on the use of electronic manifests in February 2014 in response to a statutory mandate that was contained in the Electronic Hazardous Waste Manifest Establishment Act (e-Manifest Act). The e-Manifest Act was enacted in October 2012, and required the EPA to issue implementing regulations for an electronic manifest within one year of enactment. The e-Manifest Act required the EPA to develop a national electronic manifest system, and required that the cost of developing and operating this system be offset by user fees. The EPA could not develop a final regulation for electronic manifesting until the e-Manifest legislation authorizing the system was enacted. The EPA was able to issue the final regulation shortly after the e-Manifest Act’s one-year milestone.

It should be noted that the e-Manifest Act and the February 2014 regulation do not entirely eliminate the six-copy paper manifest form. The e-Manifest Act provides that electronic manifests shall be an option for manifest users, so the EPA’s implementing regulations for the

Act likewise provide that users may elect to use either electronic or paper manifests in the future.

On Consulting with the Small Business Community and State Regulators

3. In your oral testimony, you cited the Small Business Administration's (SBA) Office of Advocacy as one tool your agency uses to get feedback from small businesses. Please elaborate on your department's use of the SBA Office of Advocacy.
 - a. How could your department better leverage the insights and resources of the Office of Advocacy?

RESPONSE: The EPA has several established mechanisms for working with SBA's Office of Advocacy.

- The EPA staff and managers regularly participate in roundtable discussions organized by the SBA's Office of Advocacy.
 - The SBA's Office of Advocacy staff participate with the EPA on all Small Business Advocacy Review panels for proposed rules that may have a significant impact on a substantial number of small entities.
 - When the EPA announces a review of a regulatory action under section 610 of the Regulatory Flexibility Act (RFA), the SBA distributes the announcement to their stakeholder groups.
 - The EPA's Office of Small Business Programs organizes semiannual meetings with senior agency officials and stakeholders, and the SBA's Office of Advocacy is invited to these meetings.
 - The SBA's Office of Advocacy participates in the Office of Management and Budget (OMB)-led interagency review of agency regulations.
4. How could your department better liaise with state regulators to ensure that regulations do not conflict with or duplicate state requirements?

RESPONSE: Since many agency programs are implemented by the states, we have close working relationships with them across many of our programs. The EPA facilitates interactions with state and local governments and coordinates those activities with our regional offices around the nation. In addition, the EPA holds regular outreach meetings with the Environmental Council of the States, Council of State Governments, National Conference of State Legislatures, and the National Governors Association and leads implementation of the National Environmental Performance Partnership System, which manages and monitors environmental issues with both national associations and individual state and local governments while focusing the EPA and state resources on the most pressing environmental problems. Each regulation issued by the EPA specifically addresses the agency's consideration of potential intergovernmental impacts consistent with the mandates in the Unfunded Mandates Reform Act and the Federalism Executive Order (E.O.) 13132. In addition, agency programs have direct connections to state regulators and the EPA often addresses program implementation issues collaboratively.

On Soliciting Comments from the Public

5. In preparation for conducting retrospective reviews as directed under Executive Order 13563, agencies have reached out for public comment in a variety of ways. Please elaborate on the advantages you witnessed in holding public hearings.
 - a. How do hearings differ from other ways to get feedback from the public, for example, through receipt of comments in online dockets?
 - b. What were some advantages and disadvantages of this approach?

RESPONSE: The EPA uses a variety of external mechanisms to identify and evaluate potential retrospective reviews. The EPA's Retrospective Review Plan was developed after extensive public outreach that sought input on an agency plan for retrospective review, as well as on possible reforms to modify, streamline, expand or repeal existing regulations. That outreach included 20 public meetings, town halls, and Webinars with over 600 participants. The EPA also solicited comments via a Federal Register notice. Since 2011, the EPA has maintained an open comment docket and an e-mail address for public feedback on the existing Plan for Periodic Retrospective Review of Existing Regulations and the subsequent progress reports. In 2015, the EPA also issued another Federal Register notice soliciting comments on issues related to retrospective review.

Regardless of how the EPA receives this information, specific suggestions regarding how rules could be modified accompanied by data or other detailed information that supports the request are the types of responses that are most useful to the agency. While public meetings can potentially reach a slightly different audience than do Federal Register notices, in our experience, the feedback from public meetings tends to be more general than the feedback received in writing. Large, broad public-meetings focused generally on retrospective review are also very resource-intensive, requiring significant amounts of time to organize and run. In addition to public meetings and Federal Register notices, the EPA also regularly meets with stakeholder and advisory groups such as the Environmental Council of the States and the National Drinking Water Advisory Committee on a variety of issues and has found the feedback regarding retrospective review offered at these types of meetings to be helpful.

On Defining the Universe of Retrospective Reviews

6. Retrospective reviews are not clearly defined in existing executive orders. For example, Executive Order 13563 merely directs agencies to "facilitate the periodic review of existing significant regulations..." Executive Order 13610 directs agencies to prioritize initiatives that will produce monetary savings, reductions in paperwork, reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. In the absence of a clear directive as to what constitutes a retrospective review as mandated by executive orders, how does your agency define the term?

RESPONSE: At the EPA, retrospective reviews can take a variety of forms and may be guided by the purpose and principles stated in E.O. 13563 or applicable statutes. Regular assessment of past regulatory actions is integral to the EPA's core mission and responsibilities and is often

mandated by statute. For example, the Clean Air Act (CAA) requires a review of National Ambient Air Quality Standards actions every five years. New Source Performance Standards and Maximum Achievable Control Technology must be reviewed every eight years. Under the Safe Drinking Water Act (SDWA), the EPA is required to review National Primary Drinking Water Regulations every six years. In addition to these statutorily mandated reviews, the EPA undertakes discretionary reviews, including those highlighted in our Retrospective Review Plan.

On Regulatory Flexibility Act Review and other Statutorily-Required Reviews

7. In 2014, in assessing retrospective review processes for Administrative Conference of the United States, Professor Joseph Aldy of Harvard's Kennedy School found that after reviewing 25 rules identified in agency reports on their progress implementing retrospective review, only 14 explicitly referenced retrospective review in the rule-making.¹ He posited that this suggested that some of the rules promulgated under the retrospective review process may have been already in progress, perhaps under existing statutory review authorities. How has your agency made the distinction between reviews in response to Executive Order 13563 and other efforts already underway or responses to new mandates?

RESPONSE: As noted above, regular assessment of past regulatory actions is integral to the EPA's core mission. Reviews undertaken in response to E.O. 13563 are highlighted in our Retrospective Review Plan and progress reports.² The EPA does not generally discuss in the preamble whether or not a specific rule was part of our original Plan or was an action later added to our progress report; therefore the absence of this information should not be taken as an indicator that a particular review was in progress at the time our Plan was developed. In addition, the EPA has added numerous reviews to our progress reports since our initial Retrospective Review Plan was developed. Nearly all of the actions identified in our current Retrospective Review Plan are in addition to those reviews required by statute.

8. The Regulatory Flexibility Act (RFA) Section 610 requires that rules with a significant economic impact on a substantial number of small entities be reviewed within ten years of promulgation, but in the past the Government Accountability Office (GAO) has found that not all agencies interpret the requirement consistently.³ In addition, other statutes mandate retrospective review of certain regulations. How have initiatives in response to the President's Executive Order 13563 aligned with other retrospective review initiatives, such as those undertaken under RFA Section 610 or other specific statutory review requirements?
- Please describe the rigor of Section 610 reviews. For example, is cost-benefit analysis typically conducted in the course of these reviews at your agency?
 - What lessons has the agency learned from conducting additional reviews consistent with other statutory mandates that have facilitated this retrospective review initiative?

¹ Joseph Aldy for the Administrative Conference of the United States. Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 48 (November 17, 2014).

² <http://www.epa.gov/laws-regulations/retrospective-review-history>

³ U.S. GOV'T ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: AGENCY'S INTERPRETATIONS OF REVIEW REQUIREMENTS VARY WIDELY, GAO/GGD-99-55, 11 (Apr. 2, 1999)

RESPONSE: Section 610 of the RFA provides that agencies shall review rules to “minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes.” In doing so, agencies are charged with considering the following factors:

- (1) the continued need for the rule;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The EPA uses the Semiannual Regulatory Agenda, which publishes in the Federal Register every six months, to announce the initiation and conclusion of these 610 reviews. Upcoming reviews are also listed on the EPA’s Web site.⁴ As directed under E.O. 13563, in the EPA’s 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*, the EPA committed to combining retrospective reviews of rules under RFA 610 with other statutorily-required reviews, such as those required under the CAA or SDWA, whenever feasible. The EPA’s retrospective review initiatives taken in response to E.O. 13563 are in addition to statutory reviews we already conduct under Section 610 of the RFA, the CAA, SDWA, and other statutes.

On Quantifying Cost Savings

9. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that agencies quantified cost savings in the progress updates for 38 of the 246 completed analyses in their scope, half of which were related to information collection burdens.⁵ Why are cost savings not consistently quantified?
 - c. When costs savings were quantified, GAO found that agencies most often attributed those savings to reduced information collection burdens. What other cost savings have resulted from these retrospective reviews?
 - d. What are the challenges in quantifying the results of these reviews and how could we do better at reporting that progress?

RESPONSE: Lack of monetization does not mean that costs and benefits are not realized. Cost savings that can be realized in retrospective review include not only monetary savings from reduced regulatory requirements and reductions in paperwork burdens, but also harder to quantify savings from activities such as streamlined permitting or review processes and greater use of advanced technology.

⁴ <http://www.epa.gov/reg-flex/section-610-reviews>

⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, *AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS*, GAO-14-268 (Apr. 11, 2014)

Consistent with the direction provided in E.O. 13610, there has been a focus on reducing paperwork burden as part of our efforts in retrospective review. Since rules that require information collection have estimates of the costs associated with that information collection as required by the Paperwork Reduction Act, it tends to be easier to quantify and monetize the savings from paperwork burden reduction.

On Record of Results of Reviews

10. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that more than 90 percent of the retrospective review analyses they examined ended in a determination to revise, clarify, or eliminate regulatory text.⁶ Would you attribute this success to how your agencies prioritized the regulations you reviewed or simply that a lot of regulations currently on the books are ripe for updates?
- e. How many of these reviews could be considered low-hanging fruit? Should we expect this level of success going forward?

RESPONSE: As stated in the EPA's 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*, the EPA determined its review priorities by gathering comments from the public, other federal agencies, and agency experts; aligning reviews with agency and The Administration's priorities; conforming to the principles and directives of E.O. 13563; and determining appropriate effort within the scope of current agency resources. Using these criteria, the EPA was able to determine the most appropriate items for review, and has subsequently added additional items to the Retrospective Review Plan using these same criteria. We believe this method has been effective at identifying actions that may warrant review and will continue to serve the interests of both the EPA and the public going forward.

On Rigor and Scope of Retrospective Review

11. In his analysis of retrospective reviews for Mercatus, Mr. Randall Lutter notes, "Very few retrospective analyses of extant federal regulations provide sufficient information to evaluate whether benefits outweighed costs. The overwhelming majority of retrospective analyses that Harrington, the OMB, and Simpson reviewed provide information only about costs, about a key but incomplete measure of benefits... or about both costs and a poor proxy for benefits..."⁷ Do your retrospective review analyses attempt to quantify costs, or benefits, or both?
- f. Does your office have the capacity to collect data to conduct effective retrospective reviews that include cost-benefit analysis? If not, why not?
- g. Would it be beneficial for your agency to have your retrospective review obligations delegated to a specialized office charged with doing just that?

⁶ GAO-14-268

⁷ Randall Lutter, Working Paper: The Role of Retrospective Analysis and Review in Regulatory Policy, MERCATUS CTR. NO. 12-14 (Apr. 2012).

RESPONSE: Retrospective reviews that occur through standard rulemaking procedures generally attempt to quantify the costs and benefits of the regulatory revision resulting from the review. However, sufficient data and information may not be available to conduct a detailed assessment of the costs and benefits of these reviews. Collection of additional information may require approval under the Paperwork Reduction Act and may also impose additional paperwork burden on the entities regulated by the action under review. Since retrospective reviews relate back to a particular regulatory action or program, the EPA generally believes that it is often beneficial for staff who are familiar with that regulatory action or program and have relevant skills and experience with that regulatory action or program to work on the retrospective review.

12. In his analysis of retrospective reviews for Mercatus, Mr. Lutter notes, “The focus on retrospective analysis and review of regulations, as opposed to regulatory programs more broadly, may be too narrow.” The 2015 OECD Regulatory Policy Outlook stated that “OECD countries could be more strategic and systemic in their evaluation efforts by conducting comprehensive reviews that assess the cumulative impact of laws and regulations in a sector as a whole, with a particular focus on the policy outcomes.”⁸ Our proposed legislation, S. 1817, The Smarter Regs Act of 2015, directs OMB to encourage and assist agencies to “streamline and coordinate the assessment of major rules with similar or related regulatory objectives” for just this purpose. When contemplating which rules to review, have you ever considered conducting simultaneous reviews on related rules or rules that affect a certain sector of industry?

- h. Have you ever considered a large retrospective review on a regulatory framework?
- i. What barriers exist to this type of review?
- j. How have you worked with interagency partners as you have reviewed existing regulations?

RESPONSE: The EPA’s focus has been on those regulations or requirements identified by our stakeholders and the public through our outreach efforts. As such, the reviews reflect their interests, either in terms of individual regulations and requirements or particular programs. The EPA has undertaken broader reviews, including an action to reduce State Implementation Plan backlogs and reduce future processing time, and an action to streamline SNAP reviews. We work with interagency partners on our retrospective reviews in that other federal agencies can and have suggested rules for review, and any reviews that affect other agencies that are done through rulemaking would be submitted to OMB for interagency review under E.O. 12866.

13. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*,⁹ GAO recommended that OIRA work with the agencies to improve how retrospective reviews could be used to inform progress towards agency priority goals under the GPRA Modernization Act of 2010.¹⁰ This included actions such as (1) identifying whether a regulation contributes to an agency priority goal as one criterion for prioritizing reviews, and (2) by including in the scope of retrospective reviews the regulations that

⁸ *OECD Regulatory Policy Outlook 2015* (The Organization for Economic Co-operation and Development, 2015) available at <http://www.oecd.org/governance/regulatory-policy/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm>.

⁹ GAO-14-268

¹⁰ GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (Jan. 4, 2011).

collectively contribute to an agency priority goal. What actions has your agency taken to better align retrospective reviews with GPRAMA agency priority goals?

RESPONSE: The EPA established an Agency Priority Goal related to burden reduction of 1 million hours by the end of fiscal 2015. The EPA has achieved this goal, in part through work on actions identified in the agency's retrospective review plan under E.O. 13563.

On Planning for Review

14. OMB Memorandum M-11-19 directed agencies to design and write future regulations in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. ACUS recommendation 2014-5 suggested that agencies, when appropriate, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. On November 3, 2015, the GW Regulatory Studies Center issued *Learning from Experience: Retrospective Review of Regulations in 2014*¹¹, which reviewed 22 significant and economically significant rules and found that none of them included a plan to conduct retrospective review of the rule after implementation. How has your agency responded to that OIRA directive and what have you learned through those efforts?

k. What actions does your agency plan to take to ensure that planning for future reviews is part of the procedures for drafting new regulations?

RESPONSE: Through its focus on Next Generation Compliance,¹² the EPA has demonstrated its commitment to issuing regulations that are as effective and efficient as they can be in achieving their intended benefits. The EPA is committed to writing rules that are designed to promote compliance and to facilitate retrospective review, in part by collecting appropriate data that can be used by the agency, the regulated community, state and local governments, and the public to facilitate implementation, measure, and verify environmental results. Our Next Generation Compliance effort has a variety of components including efforts to design regulations and permits that are easier to implement, with a goal of improved compliance and environmental outcomes; to use and promote advanced emissions/pollutant detection technology so that regulated entities, the government, and the public can more easily see pollutant discharges, environmental conditions, and noncompliance; shift toward electronic reporting to help make environmental reporting more accurate, complete, and efficient while helping the EPA and co-regulators better manage information, improve effectiveness and transparency; and expand transparency by making information more accessible to the public. The public is also welcome to send additional suggestions for regulations that may be appropriate for review to ImprovingRegulations.SuggestionBox@epa.gov or through the docket associated with our retrospective review plan.¹³

¹¹ Sofie E. Miller, *Learning From Experience: Retrospective Review of Regulations in 2014* (The George Washington University Regulatory Studies Center, Working Paper, 2015), available at <http://regulatorystudies.columbian.gwu.edu/learning-experience-retrospective-review-regulations-2014>.

¹² <http://www.epa.gov/compliance/next-generation-compliance>

¹³ <http://www.regulations.gov/#!docketDetail;D=EPA-HQ-OA-2011-0156>

15. The Department of Transportation (DOT) maintains a plan on its website to ensure that all regulations are reviewed every ten years. Each DOT agency divides its rules into 10 different groups, and analyzes one group each year. They request public comment on the timing of the reviews through the Regulatory Agenda (for example, if a particular rule should be reviewed earlier and why). Would something like this be viable at your agency?

1. How do you ensure that cyclical reviews are apparent to your stakeholders to give them an opportunity to comment?

RESPONSE: The EPA administers a variety of programs and rules based on a wide number of governing statutes. Approximately 60% of the rules on the EPA's Semiannual Regulatory Agenda are statutorily-required reviews of existing regulations. Nearly all of the actions included in the EPA's Retrospective Review Plan were added in addition to reviews required under statutes such as the CAA, SDWA, and RFA. The EPA's stakeholders are invited to participate in the EPA's rulemaking process by reviewing and sending feedback or suggestions on actions included in our Regulatory Agenda and our Retrospective Review Plan. Since 2011, the EPA has maintained an open comment docket and an e-mail address for public feedback on the existing *Plan for Periodic Retrospective Review of Existing Regulations* and the subsequent progress reports. In 2015 the EPA also issued another Federal Register notice soliciting comments on issues related to retrospective review. Any interested party may provide comment during the proposal phase of any given the agency rulemaking.

Reporting Outcomes of Retrospective Review

16. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*,¹⁴ GAO recommended that OIRA work with agencies to improve the reporting of retrospective review outcomes, including providing more comprehensive information about completed reviews. What actions has your agency taken to ensure that retrospective review reporting is more accessible and transparent?

RESPONSE: The EPA provides information in two locations on its public Web site about the semiannual progress reports. Each semiannual report is posted on our Web site and contains a column entitled "status of initiative," so that users can locate actions that are new, newly completed, or ongoing.¹⁵ The EPA also continues to maintain an open docket for feedback from the public on our retrospective review process or ongoing actions and we maintain communication through ImprovingRegulations.SuggestionBox@epa.gov, which was first provided in our 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*. The EPA indicated which actions in its Semiannual Regulatory Agenda are also retrospective review actions under E.O. 13563.

¹⁴ GAO-14-268

¹⁵ <http://www.epa.gov/laws-regulations/documents-retrospective-review>

**Post-Hearing Questions for the Record
Submitted to Mr. William Nickerson
From Senator Heidi Heitkamp**

**“Agency Progress in Retrospective Review of Existing Regulations”
November 5, 2015**

1. A critical component of retrospective review is ensuring that the public has the opportunity to provide feedback on whether regulations are in fact achieving their intended objective. However, all too often we hear from the general public, small business, and other regulated entities, that they feel disconnected from the rulemaking process, or that their voices are not being heard.
 - a. Could each of you address how your agencies engage the public and seek feedback outside of the general notices published in the Federal Register?
 - b. Do you find that the Federal Register is still the most effective means of providing notice and receiving useful feedback to help identify public concerns?

RESPONSE: Publishing notices in the Federal Register has been an effective mechanism for the EPA to provide information and solicit feedback from the public on retrospective review. The regulated community recognizes the Federal Register as a regular source for information on the EPA actions as well as a portal for communicating thoughts and suggestions with the agency. The EPA has published three notices requesting input pertaining to retrospective review which resulted in over 1,400 suggestions, many of which helped guide our selection of actions for review.

Beyond use of the Federal Register, the EPA also uses other methods to engage the public on retrospective review. One of the agency's most important assets is the relationship program and regional offices have with key stakeholders. The EPA managers and staff are in frequent contact with the regulated community before, during and following the development of agency rules. The EPA also utilizes formal meetings, both virtual and in-person to solicit feedback on retrospective reviews. In 2011, the EPA conducted twenty public meetings and town halls as well as a number of Web based dialogues related to retrospective review. More recently, the agency has reached out to small businesses, the SBA's Office of Advocacy, trade associations, as well as state and local officials to meet and obtain their suggestions for retrospective review.

Additionally, the EPA has maintained an open docket and dedicated email for the public to provide input. Regardless of how the EPA receives feedback, specific suggestions regarding how rules could be modified along with data or other detailed information that supports the request is most useful to the agency. While public meetings may sometimes reach a slightly different audience than do Federal Register notices, in our experience, the feedback from public meetings tends to be more general than feedback received in writing.

2. When examining retrospective review, we often discuss cost benefit analysis to determine whether or not a rule is achieving its stated objective. However, part of this information collection requires the solicitation of data from regulated entities.

- a. Do you find that current retrospective reviews are stymied by the strict requirements of the Paperwork Reduction Act?
- b. Would we see an increased effectiveness of the retrospective review process if we were to exempt retrospective review activities from the Paperwork Reduction Act?

RESPONSE: The Paperwork Reduction Act does mandate that the EPA meet certain requirements before collecting information from the public. The EPA is often limited to publicly available, industry-level data when assessing costs of existing rules. In theory, access to facility-level data could prove useful in assessing costs and benefits, however, there would still be additional challenges to developing detailed cost estimates of regulatory actions. Acquiring detailed cost information would place additional paperwork burden on regulated entities. It also can be challenging to separate regulatory compliance costs at the firm level from unrelated costs that were incurred at the same time. In general, the Paperwork Reduction Act has not proved a barrier to the EPA's retrospective review program.

3. During our subcommittee's maiden hearing, we invited witness from diverse backgrounds to discuss the Federal government's regulatory framework. I took the opportunity to discuss retrospective review with that panel as well. One thing I heard from both witnesses was that there needs to be a dedicated funding stream in support of retrospective review activities.
 - a. Based on current expectations of the President, as outlined in Executive Order 13563, are resources being dedicated to retrospective review at the detriment of the mission objectives of the agency?
 - b. What resources do your agencies need to effectively and efficiently carry out retrospective review while maintaining overall operational awareness?

RESPONSE: Roughly 60% of the rules on the EPA's Regulatory Agenda are retrospective reviews required by various statutes, so considerable resources are already being spent on this effort. The agency's current level of resources can support our obligations under existing statutes and our current efforts to respond to E.O. 13563.

4. In a previous hearing, Mr. Neil Eisner, a Senior Fellow at the Administrative Conference of the United States, advocated strengthening the culture of review within the Federal agencies. In his opinion there is a focus, especially among senior officials, on creating something new rather than fixing something old.
 - a. What actions are taken within each of your agencies to ensure that the workforce buys into the reality that ensuring the effectiveness of existing regulations is just as important as ensuring new rulemaking is of the highest caliber?

RESPONSE: The workforce and senior officials are responsive to stakeholder concerns and feedback on both retrospective reviews and new actions. The EPA is interested in addressing situations where the expected human health and environmental benefits associated with one of our actions are not being realized, in addition to developing new mechanisms to protect human health and the environment. A significant portion of the actions in the EPA's Regulatory Agenda already are retrospective reviews. Further, ensuring rules are effective is a high priority among senior officials at the EPA.

5. Understanding that good retrospective review often require examination of highly technical subject matter, it is important that agencies have a highly skilled and specialized work force to conduct retrospective reviews in an effective manner.
 - a. Having completed a number of retrospective reviews up to this point, what are some the challenges you have found as it relate to workforce, in completing retrospective review effectively?
 - b. Do you think the Federal Governments could do more to able to attract
 - c. Do you have dedicated staff focused on reviewing existing rules?

RESPONSE: The EPA workforce is already experienced doing retrospective reviews because they are built into many of our core statutory responsibilities. Approximately 60% of the actions on the EPA's Regulatory Agenda are retrospective reviews required by various statutes. For this reason, and because it is often beneficial to have staff who are familiar with the underlying action since those staff have relevant knowledge, skills and experience, we do not have separate, dedicated staff working solely on retrospective review. In addition, through recent efforts to promote Next Generation Compliance, the agency has provided rule writing staff with additional training and resources to design rules that are easier to implement, with a goal of improved compliance and environmental outcomes.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 08 2016

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable Heidi Heitkamp
Ranking Member
Committee on Homeland Security
and Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Heitkamp:

Thank you for your November 20, 2015, letter and the opportunity to respond to the questions for the record from the Senate Committee on Homeland Security and Governmental Affairs' hearing on November 5, 2015, entitled *Agency Progress in Retrospective Review of Existing Regulations*. Enclosed are our responses to your questions.

Again, thank you for your letter. If you have further questions, please contact me, or your staff may contact Thea Williams, in the EPA's Office of Congressional and Intergovernmental Relations, at williams.thea@epa.gov or at (202) 564-2064.

Sincerely,

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Nichole Distefano
Associate Administrator

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RESPONSE: The EPA continually looks for ways to improve the efficiency of our programs. Over the past 20 years, the SNAP program has reviewed over 400 alternatives considering such factors as flammability, toxicity, local air quality impacts, ecosystem effects, occupational and consumer health and safety impacts, ozone depletion potential and global warming potential. On the basis of those assessments, the EPA has issued 20 rulemakings and 30 notices to facilitate the introduction of lower risk alternatives into the marketplace. Additionally, our participation in the Lean Government program provided an opportunity to streamline our program and achieve significant benefits for both the agency and our stakeholders. For more information about the Lean government program visit www.epa.gov/lean.

2. In February 2014 EPA issued a final rule that established a framework for collecting hazardous waste shipment data electronically, replacing a burdensome paper manifest system that requires six-copy forms to be completed, carried and signed manually. Why did the EPA wait until 2014 to finalize a rule that eliminated the requirement for a six-copy form that needed to be completed manually?

RESPONSE: The EPA issued its final regulation on the use of electronic manifests in February 2014 in response to a statutory mandate that was contained in the Electronic Hazardous Waste Manifest Establishment Act (e-Manifest Act). The e-Manifest Act was enacted in October 2012, and required the EPA to issue implementing regulations for an electronic manifest within one year of enactment. The e-Manifest Act required the EPA to develop a national electronic manifest system, and required that the cost of developing and operating this system be offset by user fees. The EPA could not develop a final regulation for electronic manifesting until the e-Manifest legislation authorizing the system was enacted. The EPA was able to issue the final regulation shortly after the e-Manifest Act’s one-year milestone.

It should be noted that the e-Manifest Act and the February 2014 regulation do not entirely eliminate the six-copy paper manifest form. The e-Manifest Act provides that electronic manifests shall be an option for manifest users, so the EPA’s implementing regulations for the

Act likewise provide that users may elect to use either electronic or paper manifests in the future.

On Consulting with the Small Business Community and State Regulators

3. In your oral testimony, you cited the Small Business Administration's (SBA) Office of Advocacy as one tool your agency uses to get feedback from small businesses. Please elaborate on your department's use of the SBA Office of Advocacy.
 - a. How could your department better leverage the insights and resources of the Office of Advocacy?

RESPONSE: The EPA has several established mechanisms for working with SBA's Office of Advocacy.

- The EPA staff and managers regularly participate in roundtable discussions organized by the SBA's Office of Advocacy.
- The SBA's Office of Advocacy staff participate with the EPA on all Small Business Advocacy Review panels for proposed rules that may have a significant impact on a substantial number of small entities.
- When the EPA announces a review of a regulatory action under section 610 of the Regulatory Flexibility Act (RFA), the SBA distributes the announcement to their stakeholder groups.
- The EPA's Office of Small Business Programs organizes semiannual meetings with senior agency officials and stakeholders, and the SBA's Office of Advocacy is invited to these meetings.
- The SBA's Office of Advocacy participates in the Office of Management and Budget (OMB)-led interagency review of agency regulations.

4. How could your department better liaise with state regulators to ensure that regulations do not conflict with or duplicate state requirements?

RESPONSE: Since many agency programs are implemented by the states, we have close working relationships with them across many of our programs. The EPA facilitates interactions with state and local governments and coordinates those activities with our regional offices around the nation. In addition, the EPA holds regular outreach meetings with the Environmental Council of the States, Council of State Governments, National Conference of State Legislatures, and the National Governors Association and leads implementation of the National Environmental Performance Partnership System, which manages and monitors environmental issues with both national associations and individual state and local governments while focusing the EPA and state resources on the most pressing environmental problems. Each regulation issued by the EPA specifically addresses the agency's consideration of potential intergovernmental impacts consistent with the mandates in the Unfunded Mandates Reform Act and the Federalism Executive Order (E.O.) 13132. In addition, agency programs have direct connections to state regulators and the EPA often addresses program implementation issues collaboratively.

On Soliciting Comments from the Public

5. In preparation for conducting retrospective reviews as directed under Executive Order 13563, agencies have reached out for public comment in a variety of ways. Please elaborate on the advantages you witnessed in holding public hearings.
 - a. How do hearings differ from other ways to get feedback from the public, for example, through receipt of comments in online dockets?
 - b. What were some advantages and disadvantages of this approach?

RESPONSE: The EPA uses a variety of external mechanisms to identify and evaluate potential retrospective reviews. The EPA's Retrospective Review Plan was developed after extensive public outreach that sought input on an agency plan for retrospective review, as well as on possible reforms to modify, streamline, expand or repeal existing regulations. That outreach included 20 public meetings, town halls, and Webinars with over 600 participants. The EPA also solicited comments via a Federal Register notice. Since 2011, the EPA has maintained an open comment docket and an e-mail address for public feedback on the existing Plan for Periodic Retrospective Review of Existing Regulations and the subsequent progress reports. In 2015, the EPA also issued another Federal Register notice soliciting comments on issues related to retrospective review.

Regardless of how the EPA receives this information, specific suggestions regarding how rules could be modified accompanied by data or other detailed information that supports the request are the types of responses that are most useful to the agency. While public meetings can potentially reach a slightly different audience than do Federal Register notices, in our experience, the feedback from public meetings tends to be more general than the feedback received in writing. Large, broad public-meetings focused generally on retrospective review are also very resource-intensive, requiring significant amounts of time to organize and run. In addition to public meetings and Federal Register notices, the EPA also regularly meets with stakeholder and advisory groups such as the Environmental Council of the States and the National Drinking Water Advisory Committee on a variety of issues and has found the feedback regarding retrospective review offered at these types of meetings to be helpful.

On Defining the Universe of Retrospective Reviews

6. Retrospective reviews are not clearly defined in existing executive orders. For example, Executive Order 13563 merely directs agencies to "facilitate the periodic review of existing significant regulations..." Executive Order 13610 directs agencies to prioritize initiatives that will produce monetary savings, reductions in paperwork, reduce unjustified regulatory burdens or simplify or harmonize regulatory requirements imposed on small businesses. In the absence of a clear directive as to what constitutes a retrospective review as mandated by executive orders, how does your agency define the term?

RESPONSE: At the EPA, retrospective reviews can take a variety of forms and may be guided by the purpose and principles stated in E.O. 13563 or applicable statutes. Regular assessment of past regulatory actions is integral to the EPA's core mission and responsibilities and is often

mandated by statute. For example, the Clean Air Act (CAA) requires a review of National Ambient Air Quality Standards actions every five years. New Source Performance Standards and Maximum Achievable Control Technology must be reviewed every eight years. Under the Safe Drinking Water Act (SDWA), the EPA is required to review National Primary Drinking Water Regulations every six years. In addition to these statutorily mandated reviews, the EPA undertakes discretionary reviews, including those highlighted in our Retrospective Review Plan.

On Regulatory Flexibility Act Review and other Statutorily-Required Reviews

7. In 2014, in assessing retrospective review processes for Administrative Conference of the United States, Professor Joseph Aldy of Harvard's Kennedy School found that after reviewing 25 rules identified in agency reports on their progress implementing retrospective review, only 14 explicitly referenced retrospective review in the rule-making.¹ He posited that this suggested that some of the rules promulgated under the retrospective review process may have been already in progress, perhaps under existing statutory review authorities. How has your agency made the distinction between reviews in response to Executive Order 13563 and other efforts already underway or responses to new mandates?

RESPONSE: As noted above, regular assessment of past regulatory actions is integral to the EPA's core mission. Reviews undertaken in response to E.O. 13563 are highlighted in our Retrospective Review Plan and progress reports.² The EPA does not generally discuss in the preamble whether or not a specific rule was part of our original Plan or was an action later added to our progress report; therefore the absence of this information should not be taken as an indicator that a particular review was in progress at the time our Plan was developed. In addition, the EPA has added numerous reviews to our progress reports since our initial Retrospective Review Plan was developed. Nearly all of the actions identified in our current Retrospective Review Plan are in addition to those reviews required by statute.

8. The Regulatory Flexibility Act (RFA) Section 610 requires that rules with a significant economic impact on a substantial number of small entities be reviewed within ten years of promulgation, but in the past the Government Accountability Office (GAO) has found that not all agencies interpret the requirement consistently.³ In addition, other statutes mandate retrospective review of certain regulations. How have initiatives in response to the President's Executive Order 13563 aligned with other retrospective review initiatives, such as those undertaken under RFA Section 610 or other specific statutory review requirements?
 - a. Please describe the rigor of Section 610 reviews. For example, is cost-benefit analysis typically conducted in the course of these reviews at your agency?
 - b. What lessons has the agency learned from conducting additional reviews consistent with other statutory mandates that have facilitated this retrospective review initiative?

¹ Joseph Aldy for the Administrative Conference of the United States. Learning from Experience: An Assessment of the Retrospective Reviews of Agency Rules and the Evidence for Improving the Design and Implementation of Regulatory Policy 48 (November 17, 2014).

² <http://www.epa.gov/laws-regulations/retrospective-review-history>

³ U.S. GOV'T ACCOUNTABILITY OFFICE, REGULATORY FLEXIBILITY ACT: AGENCIE'S INTERPRETATIONS OF REVIEW REQUIREMENTS VARY WIDELY, GAO/GGD-99-55, 11 (Apr. 2, 1999)

RESPONSE: Section 610 of the RFA provides that agencies shall review rules to “minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes.” In doing so, agencies are charged with considering the following factors:

- (1) the continued need for the rule;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The EPA uses the Semiannual Regulatory Agenda, which publishes in the Federal Register every six months, to announce the initiation and conclusion of these 610 reviews. Upcoming reviews are also listed on the EPA’s Web site.⁴ As directed under E.O. 13563, in the EPA’s 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*, the EPA committed to combining retrospective reviews of rules under RFA 610 with other statutorily-required reviews, such as those required under the CAA or SDWA, whenever feasible. The EPA’s retrospective review initiatives taken in response to E.O. 13563 are in addition to statutory reviews we already conduct under Section 610 of the RFA, the CAA, SDWA, and other statutes.

On Quantifying Cost Savings

9. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that agencies quantified cost savings in the progress updates for 38 of the 246 completed analyses in their scope, half of which were related to information collection burdens.⁵ Why are cost savings not consistently quantified?
 - c. When costs savings were quantified, GAO found that agencies most often attributed those savings to reduced information collection burdens. What other cost savings have resulted from these retrospective reviews?
 - d. What are the challenges in quantifying the results of these reviews and how could we do better at reporting that progress?

RESPONSE: Lack of monetization does not mean that costs and benefits are not realized. Cost savings that can be realized in retrospective review include not only monetary savings from reduced regulatory requirements and reductions in paperwork burdens, but also harder to quantify savings from activities such as streamlined permitting or review processes and greater use of advanced technology.

⁴ <http://www.epa.gov/reg-flex/section-610-reviews>

⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, *AGENCIES OFTEN MADE REGULATORY CHANGES, BUT COULD STRENGTHEN LINKAGES TO PERFORMANCE GOALS*, GAO-14-268 (Apr. 11, 2014)

Consistent with the direction provided in E.O. 13610, there has been a focus on reducing paperwork burden as part of our efforts in retrospective review. Since rules that require information collection have estimates of the costs associated with that information collection as required by the Paperwork Reduction Act, it tends to be easier to quantify and monetize the savings from paperwork burden reduction.

On Record of Results of Reviews

10. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO found that more than 90 percent of the retrospective review analyses they examined ended in a determination to revise, clarify, or eliminate regulatory text.⁶ Would you attribute this success to how your agencies prioritized the regulations you reviewed or simply that a lot of regulations currently on the books are ripe for updates?
- e. How many of these reviews could be considered low-hanging fruit? Should we expect this level of success going forward?

RESPONSE: As stated in the EPA's 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*, the EPA determined its review priorities by gathering comments from the public, other federal agencies, and agency experts; aligning reviews with agency and The Administration's priorities; conforming to the principles and directives of E.O. 13563; and determining appropriate effort within the scope of current agency resources. Using these criteria, the EPA was able to determine the most appropriate items for review, and has subsequently added additional items to the Retrospective Review Plan using these same criteria. We believe this method has been effective at identifying actions that may warrant review and will continue to serve the interests of both the EPA and the public going forward.

On Rigor and Scope of Retrospective Review

11. In his analysis of retrospective reviews for Mercatus, Mr. Randall Lutter notes, "Very few retrospective analyses of extant federal regulations provide sufficient information to evaluate whether benefits outweighed costs. The overwhelming majority of retrospective analyses that Harrington, the OMB, and Simpson reviewed provide information only about costs, about a key but incomplete measure of benefits... or about both costs and a poor proxy for benefits..."⁷ Do your retrospective review analyses attempt to quantify costs, or benefits, or both?
- f. Does your office have the capacity to collect data to conduct effective retrospective reviews that include cost-benefit analysis? If not, why not?
- g. Would it be beneficial for your agency to have your retrospective review obligations delegated to a specialized office charged with doing just that?

⁶ GAO-14-268

⁷ Randall Lutter, Working Paper: The Role of Retrospective Analysis and Review in Regulatory Policy, MERCATUS CTR. NO. 12-14 (Apr. 2012).

RESPONSE: Retrospective reviews that occur through standard rulemaking procedures generally attempt to quantify the costs and benefits of the regulatory revision resulting from the review. However, sufficient data and information may not be available to conduct a detailed assessment of the costs and benefits of these reviews. Collection of additional information may require approval under the Paperwork Reduction Act and may also impose additional paperwork burden on the entities regulated by the action under review. Since retrospective reviews relate back to a particular regulatory action or program, the EPA generally believes that it is often beneficial for staff who are familiar with that regulatory action or program and have relevant skills and experience with that regulatory action or program to work on the retrospective review.

12. In his analysis of retrospective reviews for Mercatus, Mr. Lutter notes, “The focus on retrospective analysis and review of regulations, as opposed to regulatory programs more broadly, may be too narrow.” The 2015 OECD Regulatory Policy Outlook stated that “OECD countries could be more strategic and systemic in their evaluation efforts by conducting comprehensive reviews that assess the cumulative impact of laws and regulations in a sector as a whole, with a particular focus on the policy outcomes.”⁸ Our proposed legislation, S. 1817, The Smarter Regs Act of 2015, directs OMB to encourage and assist agencies to “streamline and coordinate the assessment of major rules with similar or related regulatory objectives” for just this purpose. When contemplating which rules to review, have you ever considered conducting simultaneous reviews on related rules or rules that affect a certain sector of industry?

- h. Have you ever considered a large retrospective review on a regulatory framework?
- i. What barriers exist to this type of review?
- j. How have you worked with interagency partners as you have reviewed existing regulations?

RESPONSE: The EPA’s focus has been on those regulations or requirements identified by our stakeholders and the public through our outreach efforts. As such, the reviews reflect their interests, either in terms of individual regulations and requirements or particular programs. The EPA has undertaken broader reviews, including an action to reduce State Implementation Plan backlogs and reduce future processing time, and an action to streamline SNAP reviews. We work with interagency partners on our retrospective reviews in that other federal agencies can and have suggested rules for review, and any reviews that affect other agencies that are done through rulemaking would be submitted to OMB for interagency review under E.O. 12866.

13. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*,⁹ GAO recommended that OIRA work with the agencies to improve how retrospective reviews could be used to inform progress towards agency priority goals under the GPRA Modernization Act of 2010.¹⁰ This included actions such as (1) identifying whether a regulation contributes to an agency priority goal as one criterion for prioritizing reviews, and (2) by including in the scope of retrospective reviews the regulations that

⁸ *OECD Regulatory Policy Outlook 2015* (The Organization for Economic Co-operation and Development, 2015) available at <http://www.oecd.org/governance/regulatory-policy/oecd-regulatory-policy-outlook-2015-9789264238770-en.htm>.

⁹ GAO-14-268

¹⁰ GPRA Modernization Act of 2010, Pub. L. No. 111-352, 124 Stat. 3866 (Jan. 4, 2011).

collectively contribute to an agency priority goal. What actions has your agency taken to better align retrospective reviews with GPRAMA agency priority goals?

RESPONSE: The EPA established an Agency Priority Goal related to burden reduction of 1 million hours by the end of fiscal 2015. The EPA has achieved this goal, in part through work on actions identified in the agency's retrospective review plan under E.O. 13563.

On Planning for Review

14. OMB Memorandum M-11-19 directed agencies to design and write future regulations in ways that facilitate evaluation of their consequences and thus promote retrospective analyses. ACUS recommendation 2014-5 suggested that agencies, when appropriate, establish a framework for reassessing the regulation in the future and should consider including portions of the framework in the rule's preamble. On November 3, 2015, the GW Regulatory Studies Center issued *Learning from Experience: Retrospective Review of Regulations in 2014*¹¹, which reviewed 22 significant and economically significant rules and found that none of them included a plan to conduct retrospective review of the rule after implementation. How has your agency responded to that OIRA directive and what have you learned through those efforts?

- k. What actions does your agency plan to take to ensure that planning for future reviews is part of the procedures for drafting new regulations?

RESPONSE: Through its focus on Next Generation Compliance,¹² the EPA has demonstrated its commitment to issuing regulations that are as effective and efficient as they can be in achieving their intended benefits. The EPA is committed to writing rules that are designed to promote compliance and to facilitate retrospective review, in part by collecting appropriate data that can be used by the agency, the regulated community, state and local governments, and the public to facilitate implementation, measure, and verify environmental results. Our Next Generation Compliance effort has a variety of components including efforts to design regulations and permits that are easier to implement, with a goal of improved compliance and environmental outcomes; to use and promote advanced emissions/pollutant detection technology so that regulated entities, the government, and the public can more easily see pollutant discharges, environmental conditions, and noncompliance; shift toward electronic reporting to help make environmental reporting more accurate, complete, and efficient while helping the EPA and co-regulators better manage information, improve effectiveness and transparency; and expand transparency by making information more accessible to the public. The public is also welcome to send additional suggestions for regulations that may be appropriate for review to ImprovingRegulations.SuggestionBox@epa.gov or through the docket associated with our retrospective review plan.¹³

¹¹ Sofie E. Miller, *Learning From Experience: Retrospective Review of Regulations in 2014* (The George Washington University Regulatory Studies Center, Working Paper, 2015), available at <http://regulatorystudies.columbian.gwu.edu/learning-experience-retrospective-review-regulations-2014>.

¹² <http://www.epa.gov/compliance/next-generation-compliance>

¹³ <http://www.regulations.gov/#/docketDetail;D=EPA-HQ-OA-2011-0156>

15. The Department of Transportation (DOT) maintains a plan on its website to ensure that all regulations are reviewed every ten years. Each DOT agency divides its rules into 10 different groups, and analyzes one group each year. They request public comment on the timing of the reviews through the Regulatory Agenda (for example, if a particular rule should be reviewed earlier and why). Would something like this be viable at your agency?

1. How do you ensure that cyclical reviews are apparent to your stakeholders to give them an opportunity to comment?

RESPONSE: The EPA administers a variety of programs and rules based on a wide number of governing statutes. Approximately 60% of the rules on the EPA's Semiannual Regulatory Agenda are statutorily-required reviews of existing regulations. Nearly all of the actions included in the EPA's Retrospective Review Plan were added in addition to reviews required under statutes such as the CAA, SDWA, and RFA. The EPA's stakeholders are invited to participate in the EPA's rulemaking process by reviewing and sending feedback or suggestions on actions included in our Regulatory Agenda and our Retrospective Review Plan. Since 2011, the EPA has maintained an open comment docket and an e-mail address for public feedback on the existing *Plan for Periodic Retrospective Review of Existing Regulations* and the subsequent progress reports. In 2015 the EPA also issued another Federal Register notice soliciting comments on issues related to retrospective review. Any interested party may provide comment during the proposal phase of any given the agency rulemaking.

Reporting Outcomes of Retrospective Review

16. In the April 2014 GAO report *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*,¹⁴ GAO recommended that OIRA work with agencies to improve the reporting of retrospective review outcomes, including providing more comprehensive information about completed reviews. What actions has your agency taken to ensure that retrospective review reporting is more accessible and transparent?

RESPONSE: The EPA provides information in two locations on its public Web site about the semiannual progress reports. Each semiannual report is posted on our Web site and contains a column entitled "status of initiative," so that users can locate actions that are new, newly completed, or ongoing.¹⁵ The EPA also continues to maintain an open docket for feedback from the public on our retrospective review process or ongoing actions and we maintain communication through ImprovingRegulations.SuggestionBox@epa.gov, which was first provided in our 2011 *Final Plan for Periodic Retrospective Reviews of Existing Regulations*. The EPA indicated which actions in its Semiannual Regulatory Agenda are also retrospective review actions under E.O. 13563.

¹⁴ GAO-14-268

¹⁵ <http://www.epa.gov/laws-regulations/documents-retrospective-review>

**Post-Hearing Questions for the Record
Submitted to Mr. William Nickerson
From Senator Heidi Heitkamp**

**“Agency Progress in Retrospective Review of Existing Regulations”
November 5, 2015**

1. A critical component of retrospective review is ensuring that the public has the opportunity to provide feedback on whether regulations are in fact achieving their intended objective. However, all too often we hear from the general public, small business, and other regulated entities, that they feel disconnected from the rulemaking process, or that their voices are not being heard.
 - a. Could each of you address how your agencies engage the public and seek feedback outside of the general notices published in the Federal Register?
 - b. Do you find that the Federal Register is still the most effective means of providing notice and receiving useful feedback to help identify public concerns?

RESPONSE: Publishing notices in the Federal Register has been an effective mechanism for the EPA to provide information and solicit feedback from the public on retrospective review. The regulated community recognizes the Federal Register as a regular source for information on the EPA actions as well as a portal for communicating thoughts and suggestions with the agency. The EPA has published three notices requesting input pertaining to retrospective review which resulted in over 1,400 suggestions, many of which helped guide our selection of actions for review.

Beyond use of the Federal Register, the EPA also uses other methods to engage the public on retrospective review. One of the agency's most important assets is the relationship program and regional offices have with key stakeholders. The EPA managers and staff are in frequent contact with the regulated community before, during and following the development of agency rules. The EPA also utilizes formal meetings, both virtual and in-person to solicit feedback on retrospective reviews. In 2011, the EPA conducted twenty public meetings and town halls as well as a number of Web based dialogues related to retrospective review. More recently, the agency has reached out to small businesses, the SBA's Office of Advocacy, trade associations, as well as state and local officials to meet and obtain their suggestions for retrospective review.

Additionally, the EPA has maintained an open docket and dedicated email for the public to provide input. Regardless of how the EPA receives feedback, specific suggestions regarding how rules could be modified along with data or other detailed information that supports the request is most useful to the agency. While public meetings may sometimes reach a slightly different audience than do Federal Register notices, in our experience, the feedback from public meetings tends to be more general than feedback received in writing.

2. When examining retrospective review, we often discuss cost benefit analysis to determine whether or not a rule is achieving its stated objective. However, part of this information collection requires the solicitation of data from regulated entities.

- a. Do you find that current retrospective reviews are stymied by the strict requirements of the Paperwork Reduction Act?
- b. Would we see an increased effectiveness of the retrospective review process if we were to exempt retrospective review activities from the Paperwork Reduction Act?

RESPONSE: The Paperwork Reduction Act does mandate that the EPA meet certain requirements before collecting information from the public. The EPA is often limited to publicly available, industry-level data when assessing costs of existing rules. In theory, access to facility-level data could prove useful in assessing costs and benefits, however, there would still be additional challenges to developing detailed cost estimates of regulatory actions. Acquiring detailed cost information would place additional paperwork burden on regulated entities. It also can be challenging to separate regulatory compliance costs at the firm level from unrelated costs that were incurred at the same time. In general, the Paperwork Reduction Act has not proved a barrier to the EPA's retrospective review program.

3. During our subcommittee's maiden hearing, we invited witness from diverse backgrounds to discuss the Federal government's regulatory framework. I took the opportunity to discuss retrospective review with that panel as well. One thing I heard from both witnesses was that there needs to be a dedicated funding stream in support of retrospective review activities.
 - a. Based on current expectations of the President, as outlined in Executive Order 13563, are resources being dedicated to retrospective review at the detriment of the mission objectives of the agency?
 - b. What resources do your agencies need to effectively and efficiently carry out retrospective review while maintaining overall operational awareness?

RESPONSE: Roughly 60% of the rules on the EPA's Regulatory Agenda are retrospective reviews required by various statutes, so considerable resources are already being spent on this effort. The agency's current level of resources can support our obligations under existing statutes and our current efforts to respond to E.O. 13563.

4. In a previous hearing, Mr. Neil Eisner, a Senior Fellow at the Administrative Conference of the United States, advocated strengthening the culture of review within the Federal agencies. In his opinion there is a focus, especially among senior officials, on creating something new rather than fixing something old.
 - a. What actions are taken within each of your agencies to ensure that the workforce buys into the reality that ensuring the effectiveness of existing regulations is just as important as ensuring new rulemaking is of the highest caliber?

RESPONSE: The workforce and senior officials are responsive to stakeholder concerns and feedback on both retrospective reviews and new actions. The EPA is interested in addressing situations where the expected human health and environmental benefits associated with one of our actions are not being realized, in addition to developing new mechanisms to protect human health and the environment. A significant portion of the actions in the EPA's Regulatory Agenda already are retrospective reviews. Further, ensuring rules are effective is a high priority among senior officials at the EPA.

5. Understanding that good retrospective review often require examination of highly technical subject matter, it is important that agencies have a highly skilled and specialized work force to conduct retrospective reviews in an effective manner.
- a. Having completed a number of retrospective reviews up to this point, what are some the challenges you have found as it relate to workforce, in completing retrospective review effectively?
 - b. Do you think the Federal Governments could do more to able to attract
 - c. Do you have dedicated staff focused on reviewing existing rules?

RESPONSE: The EPA workforce is already experienced doing retrospective reviews because they are built into many of our core statutory responsibilities. Approximately 60% of the actions on the EPA's Regulatory Agenda are retrospective reviews required by various statutes. For this reason, and because it is often beneficial to have staff who are familiar with the underlying action since those staff have relevant knowledge, skills and experience, we do not have separate, dedicated staff working solely on retrospective review. In addition, through recent efforts to promote Next Generation Compliance, the agency has provided rule writing staff with additional training and resources to design rules that are easier to implement, with a goal of improved compliance and environmental outcomes.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 22 2015

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable Ed Whitfield
Chairman
Subcommittee on Energy and Power
Committee on Environment and Public Works
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of November 2, 2015, to Acting Assistant Administrator Janet McCabe requesting responses to Questions for the Record following the October 7, 2015, hearing before the Subcommittee on Energy and Power titled, "EPA's CO2 Regulations for New and Existing Power Plants."

The responses to the questions are provided as an enclosure to this letter. If you have any further questions please contact me, or your staff may contact Kevin Bailey at bailey.kevinj@epa.gov or (202) 564 2998.

Sincerely,

A handwritten signature in black ink, which appears to read "Nichole Distefano".

Nichole Distefano
Associate Administrator

Questions for the Record
House Energy and Commerce, Subcommittee on Energy and Power
Hearing Titled: EPA's CO2 Regulations for New and Existing Power Plants
October 7, 2015

Janet McCabe, Acting Assistant Administrator

The Honorable Ed Whitfield

1. Under the 111 (d) Rule for existing power plants, States must file a State Plan by September 6, 2016 unless it submits an extension request that is approved by EPA. What specifically must be included in such an extension request in order to be approved by the agency?

In a memorandum dated October 22, 2015, the EPA outlined the modest requirements for such an extension request; the memorandum is available at <http://www3.epa.gov/airquality/cpptoolbox/cpp-initial-subm-memo.pdf>. However, on February 9 2016, the Supreme Court granted a motion to stay the Clean Power Plan. As a result of that action, states are not currently required to submit a state plan or a request for extension by September 6, 2016.

The Honorable John Shimkus

1. Do you agree that if EPA is underestimating coal power capacity in the baseline of its 111 (d) rule for existing power plants, the agency may be under-reporting the impacts of its rule on coal generation?

A. If so, why and if not, why not?

The EPA uses the best available science and information to understand and estimate the effects of its significant rules. The Regulatory Impact Analysis (RIA) accompanying the Clean Power Plan includes an extensive discussion of the baseline on which the EPA relied in developing the RIA, as well as of the effects of implementation of the CPP on coal-fired generation. More information about these effects is available in the final Regulatory Impact Analysis available at <http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis>.

2. In the final 111 (d) rule, EPA dramatically increased its estimates for renewable energy development under Building Block 3, and the final renewable energy generation level in 2030 is more than twice the level in the proposed rule.

A. Please provide a detailed explanation for the record of the assumptions that EPA used to support its projections in the final rule of such a large scale growth of renewables.

B. Please provide a detailed explanation of why EPA projects such a large scale increase while the U.S. Energy Information Administration's estimates for the same time period are significantly lower.

The EPA discussed the quantification of Building Block 3, including changes from the proposed Clean Power Plan and projections from the Energy Information Administration, the National Renewable Energy Laboratory, and other sources in Chapter V of the final Clean Power Plan (80 Fed. Reg. 64,717 et seq.) and Chapter 4 of the Greenhouse Gas Mitigation Measures Technical Support Document (available at <http://www.epa.gov/sites/production/files/2015-11/documents/tsd-cpp-ghg-mitigation-measures.pdf>).

The Honorable Joe Barton

1. Is there anything stopping the EPA from taking a progressively even broader view of its authority under the Clean Air Act if the Supreme Court does not strike down your "outside the fence" approach when the various challenges ultimately make their way to the Court? For example, if this approach is validated, couldn't the EPA seek to reduce emissions from oil and gas refineries by taking steps to artificially deflate the demand for gasoline?

The EPA explained in section XVIII(B)(2) of the Legal Memorandum Accompanying Clean Power Plan for Certain Issues why the rationale for the Best System of Emission Reduction (BSER) in the final Clean Power Plan would not apply broadly to other industries, such as refineries, due to certain unique characteristics of the power supply industry. It specifically discusses measures to reduce consumer gasoline consumption. The Legal Memorandum is available at <http://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf>.

2. Am I correct in reading your RIA that approximately half of the economic benefits you claim come from this rule do not even come from reducing CO₂, but from reducing other pollutants below levels required by the NAAQS? In other words, if the NAAQS are supposedly set at levels that are the absolute minimum necessary to protect human health, how can you then turn around and claim a health benefit from reducing them even further? If you are claiming benefits for reductions below NAAQS levels, shouldn't you be lowering the NAAQS proportionately?

The EPA discussed in Chapter 4 of the Regulatory Impact Analysis accompanying the final Clean Power Plan (available at <http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis>) as well as in the most recent RIAs accompanying the PM NAAQS (available at http://www3.epa.gov/ttn/naaqs/standards/pm/s_pm_2007_ria.html) and ozone NAAQS (available at <http://www3.epa.gov/ozoncpollution/pdfs/20151001ria.pdf>) the way in which the best available science demonstrates that reductions in air pollution bring health benefits, even when those reductions result in ambient concentrations of NAAQS pollutants below the National Ambient Air Quality Standards themselves. The NAAQS are not set to a zero-risk level, but rather at a level that, in the judgment of the Administrator, is requisite to protect public health and welfare with an adequate margin of safety. Fine particle pollution is not a threshold pollutant, and we anticipate health benefits for reductions even at concentrations below the NAAQS.

3. How does it make sense to set an emission standard that is lower for an existing plant than the one you are setting for new plants?

This question is discussed in Section XI of the 111(b) preamble and in the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues" (<https://www.epa.gov/sites/production/files/2015-11/documents/cpp-legal-memo.pdf>). This question is the subject of pending litigation in the D.C. Circuit and EPA will be addressing the question in the brief that EPA is currently scheduled to file on March 28, 2016.

The Honorable Rence Ellmers

1. By EPA's signing of the final 111 (d) rule, are we to assume that disagreement with the Natural Resources Defense' Council and Earthjustice who submitted legal briefs to the federal court stating that "the text of § 111 (d)(1)(A) makes clear that EPA may not set standards for a pollutant that is 'emitted from a source category which is regulated under section 112'?"

The EPA discussed its legal authority for the final Clean Power Plan, including the meaning of Clean Air Act Section 111(d)(1)(A), in Chapter 4 of the preamble to the final Clean Power Plan (80 Fed. Reg. 64,710 et seq.). Further, EPA's legal authority for the CPP is the topic of pending litigation in the D.C. Circuit and EPA will be addressing that issue in the brief that EPA is currently scheduled to file on March 28, 2016.

2. Do you agree with the Natural Resources Defense Council and Earthjustice who submitted legal briefs to the federal court stating that Chevron deference should not be afforded to the EPA in applying 111(d) because there is no statutory ambiguity? More specifically, on January 12, 2007 these groups submitted legal briefs to the DC Circuit Court of Appeals and stated that the EPA of "manufacture[d]" ambiguity in Section 111 (d) in order to claim Chevron deference.

The EPA discussed its legal authority for the final Clean Power Plan, including ambiguity in Clean Air Act Section 111(d), in Chapter 4 of the preamble to the final Clean Power Plan (80 Fed. Reg. 64,710 et seq.). Further, EPA's legal authority for the CPP is the topic of pending litigation in the D.C. Circuit and EPA will be addressing that issue in the brief that EPA is currently scheduled to file on March 28, 2016.

3. Why has your agency consistently opposed attempts to seek judicial review prior to forcing states to develop complex rules in light of Administrator McCarthy's admission that this federalized power plan will not have any significant impact on global warming?

The final Clean Power Plan would reduce power sector carbon pollution by 32 percent below 2005 levels in 2030 – that's 870 million tons less carbon pollution. The EPA firmly believes the Clean Power Plan will be upheld in court when the merits are considered because the rule rests on strong scientific and legal foundations.

4. Your agency has routinely opposed states from intervening in lawsuits filed by environmental groups against the EPA - in effect blocking the states from having any input into the sue-and-settle strategies employed by special interest groups. Many states have already committed to challenging this rule in federal court when the final rule is published in the federal register. Will your agency oppose the states' legal standing despite the fundamental impact this rule will have on states?

The EPA does not routinely oppose states' intervention in lawsuits filed by environmental groups against the agency. The EPA did not oppose states' standing in their challenge to the CPP. On February 9, 2016, the Supreme Court stayed implementation of the Clean Power Plan pending judicial review. The Court's decision was not on the merits of the rule. The EPA firmly believes the Clean Power Plan will be upheld when the merits are considered because the rule rests on strong scientific and legal foundations.

5. Many states will be filing a challenge to this rule and will be asking for stay of this rule. The final rule acknowledges that 1) GHG reductions have already occurred - in fact North Carolina has seen a reduction in GHG emissions of almost 25%, 2) thanks to the natural gas revolution GHG emissions reductions will continue to occur, and 3) this rule will have no significant impact on climate change I will assume that you agree with your staff and therefore will not oppose the state's request to stay the rule until judicial review is completed.

On February 9, 2016, the Supreme Court stayed implementation of the Clean Power Plan pending judicial review. The Court's decision was not on the merits of the rule. The EPA firmly believes the Clean Power Plan will be upheld when the merits are considered because the rule rests on strong scientific and legal foundations.

The Honorable Adam Kinzinger

1. In its Clean Power Plan, the EPA is imposing mandatory reductions in carbon dioxide emissions for certain states, 42% in Illinois, for example. What happens if a state determines that energy prices for ratepayers are going to significantly increase because of these reductions? Is the emissions goal fixed or are there circumstances in which a state can adjust its goals?

The final Clean Power Plan sets strong but reasonable and achievable benchmarks for power plant carbon emissions, thus providing national consistency, accountability and fair goals for emissions reductions. The final Clean Power Plan provides guidelines for the development, submittal and implementation of state plans that implement the interim and final CO2 emission performance rates. The flexibility of the rule allows states to reduce costs to consumers, minimize stranded assets and spur private investments in renewable energy and energy efficiency technologies and businesses. States can tailor their plans to meet their respective energy, environmental and economic needs and goals, and those of their local communities.

2. Existing plants will need to be shut down in many states to meet the mandatory carbon dioxide emissions reductions. What happens if a state determines these reductions and shutting down existing plants is going to threaten reliability?

A. The EPA has developed a "safety valve" that can apply in emergency situations; does this safety valve relieve a state of its requirement to meet certain carbon dioxide emissions?

The final Clean Power Plan sets strong but reasonable and achievable benchmarks for power plant carbon emissions, thus providing national consistency, accountability and fair goals for emissions reductions. As discussed in Chapter 8 of the final Clean Power Plan (80 Fed. Reg. 64,874 et seq.), both the extensive flexibility built into the final Clean Power Plan and multiple reliability-focused tools provided to states will ensure the continued reliability of the electricity system. Chapter 8 includes a detailed discussion of reliability-focused tools, including the reliability safety valve.

3. The final rule includes revisions regarding nuclear power compared to the proposed rule. For example, the new rule clarifies that states can use "power uprates" at existing nuclear power plants as a way to meet these target CO₂ emission reductions. There were other changes to the final rule regarding nuclear power as well; however, at a September Subcommittee hearing NRC Chairman Burns told the Subcommittee that EPA had not consulted with the NRC on nuclear components of the Clean Power Plan. To your knowledge, did the EPA consult with the NRC about the nuclear aspects of this plan before the rule was finalized?

A. Do you know how many requests for power uprates are pending before the Commission, how long it normally takes to get those approved, or the total megawatts that are technically or economically feasible with our existing nuclear plants?

B. Does the EPA plan to consult the NRC going forward on these issues? Especially since applications for new reactors, power uprates, and license renewals all must be reviewed and approved by the NRC?

The NRC participated in interagency review of the final Clean Power Plan. All comments were considered and many changes and improvements were made as a result of the process. We defer questions regarding the Commission's operations to the NRC.

4. During the formulation of this plan, what kind of research or consideration was put into the number of indirect jobs that will be lost as a result of plant closure and increased electricity prices for small businesses and manufacturers? For example, a recent study in Illinois found that if three existing plants were to close it would result in 2,500 direct jobs, 4,431 indirect jobs, and \$1.8 billion in reduced economic activity.

The EPA used the best available science and information, as well as the information provided in the more than 4.3 million public comments, to estimate the economic effects and shifts in employment that could result from implementation of the final Clean Power Plan. More discussion of that is available in Chapter 9 of the final Clean Power Plan (80 Fed. Reg. 64,928) and in the Regulatory Impact Analysis accompanying the final Clean Power Plan (available at <http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis>).

The Honorable John Shimkus

1. Please provide a detailed explanation for the record why, for its 111 (d) rule, EPA estimated 244 gigawatts of coal generation capacity by 2020 in its June 2014 RIA baseline and an estimated 208 gigawatts of coal generation capacity by 2020 in the August 2015 RIA baseline.
2. Please provide a detailed explanation for the record why, for its 11 l(d) rule, EPA projects 214 gigawatts of coal capacity in 2016, while the Department of Energy's Energy Information Administration projections are about 261 gigawatts for 2016.
3. Please provide a detailed explanation for the record why in March of 2015 EPA estimated 238 gigawatts of coal generation in its baseline for 2016 and why in August 2015 the agency reported 214 gigawatts in 2016 for baseline coal generation.

The EPA discussed the assumptions underlying each of these projections in the Regulatory Impact Analysis accompanying the final Clean Power Plan, available at <http://www.epa.gov/cleanpowerplan/clean-power-plan-final-rule-regulatory-impact-analysis>. This Regulatory Impact Analysis was developed after carefully considering the more than 4.3 million public comments received on the proposed Clean Power Plan, including many which urged changes to our projections of coal capacity and generation as well as additional information from a variety of sources, including the Energy Information Administration.

The Honorable Mike Pompeo

1. The EPA's response to my June 2014 question for the record asking for specific information relating to meetings between EPA and White House personnel concerning the agency's proposed rule for existing power plants, referred to by the agency as its "Clean Power Plan," was completely unsatisfactory and failed to provide any of the information requested. (See Feb. 11, 2015 EPA Response to Questions for the Record available at <http://docs.house.gov/meetings/IF/IF03/20140619/102346/HHRG-113-IF03-W stateMcCabeJ-20140619-SD003.pdf>, at p. 14). You promised to take our request back and get specific answers. For each meeting between EPA and White House personnel concerning the "Clean Power Plan," please provide the following information:
 - A. Date;
 - B. Location;
 - C. Attendees;
 - D. Specific subject matter of the meeting;
 - E. Whether there were any associated letters or memoranda prepared in connection with the meeting; and
 - F. Whether John Podesta attended the meeting, and if so, his role in connection with the Meeting

Consistent with E.O. 12866, the proposed rule and final rule underwent interagency review prior to their releases. And as part of the interagency review process, EPA staff met with other agencies and the Office of Management and Budget to discuss the draft proposed and

draft final Clean Power Plan.

Since the President has made addressing climate change a priority, the Clean Power Plan might have come up at a variety of meetings, involving staff from multiple agencies. Locations, attendees, and other details of the meetings in question varied, in part depending on whether the meetings were initiated by the EPA or by others. There is no comprehensive list of all those who participated in these meetings.

The Honorable Bill Flores

I. The Clean Power Plan will be fully implemented by 2030 according to your present plan. What will be the emissions reduction across the nation for Carbon Dioxide in the year 2050 versus today?

The EPA did not project reductions in carbon pollution due to the Clean Power Plan in 2050.

The Honorable Billy Long

I. In Missouri, we rely on coal for 83 percent of our energy generation. The Clean Power Plan places a huge burden on coal-fired power plants, and this rule also restricts the construction of new natural gas plants as a compliance measure. Could you explain why the EPA restricts the construction of new natural gas-fired power plants as a compliance measure?

The final Clean Power Plan sets strong but reasonable and achievable emissions guidelines for power plant carbon dioxide emissions, thus providing national consistency, accountability and fair goals for emissions reductions. The final Clean Power Plan, which addresses existing sources, gives states the option of allowing new natural gas plants to help towards compliance, but does not require that states do so. This option is further discussed in Chapter 8 of the final Clean Power Plan (80 Fed. Reg. 64,826 et seq.).



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 22 2015

OFFICE OF
CONGRESSIONAL AND
INTERGOVERNMENTAL
RELATIONS

The Honorable Tim Murphy
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Enclosed please find the U.S. Environmental Protection Agency's responses to the Subcommittee's questions for the record following the October 8, 2015, hearing titled "Volkswagen Emissions Cheating Allegations: Initial Questions."

I hope this information is helpful to you and the members of the Subcommittee. If you have further questions, please contact me or your staff may contact Matthew Davis in the EPA's Office of Congressional and Intergovernmental Relations at davis.matthew@epa.gov or at (202) 564-1267.

Sincerely,

A handwritten signature in black ink, appearing to read "Nichole Distefano".

Nichole Distefano
Associate Administrator

Enclosure

Attachment 1-Additional Questions for the Record

The Honorable Tim Murphy

1. **Vehicle technology is constantly changing. With vehicles operating potentially more than 100 million lines of code – more than an airliner or F-22 – these are incredibly complex machines, creating ample opportunities for the existence of intentional or unintentional functions that affect vehicle compliance with existing standards.**

- a. **How does the EPA keep pace with advancements in vehicle technology?**

Response: EPA's staff includes vehicle technology experts, many with automotive industry background. They include engineers who have industry experience using software development tools to calibrate engine management functions. Like other professionals, these employees maintain and expand their expertise through ongoing professional contacts and affiliations, as well as through specialized training. In addition, the EPA regularly conducts its own assessments to understand and/or improve upon emissions-related technologies.

- b. **How often does the agency evaluate the effectiveness of its testing relative to advancements in technology?**

Response: We are continually looking at ways to improve our testing programs. We do this both formally and informally. We formally evaluate and update testing protocols through the rulemaking process, and do so informally, as we are doing now in light of the VW matter as new technologies and situations emerge. For example, within the last decade we updated testing protocols to accommodate plug-in hybrid and various other electric vehicle technologies. We also announced to manufacturers on September 25, 2015 that we would implement new protocols to screen for the presence of defeat devices, and we now are applying those procedures to both new and in-use vehicles, including gasoline and diesel.

- c. **When did EPA last revise testing standards for light duty vehicles?**

Response: The EPA continually updates its testing procedures as technology advances for vehicles and testing equipment. Virtually every new vehicle regulation that the EPA issues includes some updates to the test procedures including the rulemaking that set our latest Tier 3 standards completed in 2014. Updates to the driving cycles used in the testing have been less frequent as changes to real world driving occur over a longer period. In the late 1990s, the EPA implemented three additional driving cycles to better represent operation during cold temperatures (20°F), high accelerations, high speeds, high temperature/heat load (95°F + high solar load), and air conditioning use. In total, the EPA light-duty vehicle regulations have five driving cycles that represent a robust wide range of in-use operating conditions.

2. **Why did the EPA's testing fail to identify the existence of these defeat devices?**

Response: It appears that the software on the 2.0L vehicles is designed to precisely recognize the test and to operate within legal limits during testing. Our efforts to learn the truth about emission exceedances and other irregularities were impeded and obstructed by material omissions and misleading information from VW.

In September, 2015, a few days after issuing the first Notice of Violation to VW, EPA notified manufacturers that it would expand its compliance oversight by testing vehicles in new and unpredictable ways, and began doing so (it was in fact this enhanced EPA screening that subsequently identified the defeat device in the 3.0L VW products). EPA continually updates its compliance oversight protocols. The VW experience has reinforced the need to constantly adjust our approach. We are currently using both laboratory and on-road testing technologies to monitor emissions performance.

3. Prior to the discovery of the defeat devices, did the EPA conduct in-use emissions testing of light duty vehicles?

Response: Yes.

a. If so, how frequently was this done and how did you select the vehicles to test?

Response: Although it would be infeasible for EPA to test each vehicle that is produced, EPA's approach to light-duty compliance oversight is comprehensive and multi-dimensional. We scrutinize certification applications for technical merit and design integrity before vehicle production begins. We test vehicles before, during, and after production, and even several years after vehicles are in customer hands. We review thousands of manufacturer in-use verification program test results as well as emissions defect reports. We use surveillance and, when potential problems are indicated, target specific vehicle models for testing or extra review based on a multiplicity of information sources. We also conduct random audits of manufacturer testing and compliance protocols. The EPA's in-use surveillance testing program involves recruiting approximately 150 customer-owned in-use light duty vehicles each year for testing at the EPA's National Vehicle Fuel and Emissions Laboratory in Ann Arbor, MI.

b. If not, why not?

Response: N/A (See response to question 3a.)

4. On September 25, 2015, the agency announced that it would be conducting additional in- use testing to evaluate the use of defeat devices in all vehicles.

a. How does this testing differ for standard emissions testing and affect the timing of the certification of conformity approvals?

Response: The EPA is not revealing the nature of the expanded testing so as to keep it unpredictable for manufacturers. It does involve running more tests than had previously been the standard and testing in additional conditions that may be expected to be encountered in normal operation and use. This additional testing may add two to three weeks to the confirmatory testing process. However this testing typically happens in advance of submission of the application for certification and can occur in parallel with other pre-certification activity, so this testing will not necessarily add time to the application review or unduly delay the issuance of the certificate.

b. Is EPA conducting this testing only to identify the use of "defeat devices"?

Response: The testing is designed to screen for defeat devices and to identify certain other kinds of emission problems that might not be seen on standard Federal Test Procedures.

- c. **If the agency identifies anomalies in the additional testing procedures, what steps will it take to validate findings and disclose procedures and results to affected auto makers?**

Response: In general, the EPA will undertake additional investigation to understand the anomalies, potentially involving further testing and/or communication with the manufacturer. The specific next steps the Agency may take cannot be generalized because each case is different. EPA's follow-up will depend on the facts specific to each circumstance. Where appropriate, the EPA may share data and corroborate test results with the California Air Resources Board.

5. **Of the three generations of VW vehicles, how did emissions differ from one generation to the next, according to data EPA, CARB collected?**

Response: This is the subject of ongoing investigations.

- a. **What kind of data do you have for generation 3 vehicles?**

Response: This is the subject of ongoing investigations.

- b. **Was the generation 3 technology getting closer to compliance with EPA emissions standards?**

Response: This is the subject of ongoing investigations.

6. **On September 3, 2015, VW admitted to CARB and EPA that its vehicles contained defeat devices.**

- a. **Was this the first time that the issue of potential defeat devices came up? Was EPA or CARB specifically looking to see if defeat devices existed prior to this point?**

Response: The EPA and CARB were looking for the cause of the excess emissions identified in the ICCT/West Virginia University study. Defeat devices were one potential cause that the agencies considered. It was not until and after the September 3, 2015 meeting that the admission of a defeat device and related details became clear.

- b. **What prompted VW to admit the existence of a defeat device at this point in time?**

Response: As stated in our September 18, 2015 Notice of Violation, VW admitted to designing and installing a defeat device in the 2.0 liter diesel vehicles only after it became clear that CARB and the EPA would not approve certificates of conformity for the 2016 model year diesel product until VW could adequately explain the anomalous emissions from the earlier model year vehicles and assure the agencies that the 2016 vehicles would not have similar issues.

- c. **Who provided this information to CARB and EPA? Were these the same individuals involved in the previous briefings or discussions?**

Response: The information was provided to CARB and the EPA by employees and managers from Volkswagen AG and Volkswagen Group of America. Due to the ongoing investigation, we cannot provide additional information at this time.

- d. **Did they provide an explanation why they had not provided you with this**

information prior to this date?

Response: EPA cannot comment at this time due to the ongoing investigation.

i. Do you believe that the individuals you were engaged with since May 2014 were aware of the defeat device prior to the September disclosure?

Response: EPA cannot comment at this time due to the ongoing investigation.

7. In your written testimony, you stated that "after the high emissions were discovered, VW concealed the facts from the EPA, the State of California and from consumers."

a. What specifically did VW conceal?

Response: For at least six years, VW has been installing illegal software in some of its diesel passenger cars. This software is designed to trick emissions tests into thinking VW's diesel cars meet the standards that protect clean air. The software turns off emissions controls when driving normally, and turns them on when the car is undergoing an emissions test. This illegal practice was concealed from EPA and the California Air Resources Board. Due to the fact that the investigation is continuing additional facts may yet become known.

b. Do you believe the individuals EPA was interacting with had knowledge of the defeat device and intentionally withheld this information?

Response: EPA cannot comment at this time due to the ongoing investigation.

8. Please explain how EPA's recall process works:

Response: EPA has the authority under Section 207(c)(1) of the Clean Air Act to require a manufacturer to issue a recall when EPA determines that a substantial number of vehicles do not conform to EPA regulations. When EPA identifies an emissions problem that necessitates a recall, the manufacturer may and typically does choose to perform the recall voluntarily. If EPA orders a recall, EPA must first approve the manufacturer's recall plan. Regardless of whether the recall is ordered or voluntary, the manufacturer must track and report customer participation. The regulations at 40 CFR Part 85 Subpart S contain the applicable requirements and process when EPA orders a recall.

a. Does EPA review and approve a proposed solution prior to a manufacturer pursuing a recall?

Response: Yes, for ordered recalls, EPA reviews a manufacturer's proposed solution before approving a recall plan and before the manufacturer implements the recall.

b. What is the process for notifying customers?

Response: Manufacturers must describe the process they will use to notify customers in the recall plan they submit for EPA approval. Per Clean Air Act section 207 and EPA's regulations in 40 CFR part 85, subpart S (40 CFR 85.1801-85.1808) manufacturers are, at a minimum, required to notify customers by mail. However, this does not preclude manufacturers from using additional means to contact their customers (e.g., email, telephone, social media, etc.).

c. Does EPA track recall compliance and, if so, how does that work?

Response: Yes. Once a recall is underway, manufacturers must submit quarterly reports to EPA summarizing overall recall response and repair rates.

9. On average, how many EPA/emissions-related compliance recalls are conducted annually?

Response: On average, about 30 - 40 separate EPA/emissions-related compliance recalls are conducted a year, affecting some 2 - 4 million vehicles. These include ordered and voluntary recalls, but the vast majority of emissions recalls are conducted voluntarily by the manufacturer. Many of these voluntary recalls are for minor fixes such as software improvements or upgrades.

a. What is the average take-rate, or consumer response, for EPA recalls?

Response: EPA recall regulations require manufacturers to report recall completion rates for six quarters following the start of a recall, whether the recall is ordered by EPA or initiated voluntarily by the manufacturer. The most recent analysis EPA has on emissions recall completion rates is from recalls that were initiated in 2010. It shows an overall average completion rate of 65% after six quarters of reporting.

10. What happens if a customer does not get their vehicle fixed once a recall is announced?

Response: Manufacturers are responsible for issuing recall notices and following up with vehicle owners. EPA does not interact directly with car owners on recalls. Some states with emissions inspections programs require proof of repair prior to inspection, and in some states, prior to annual registration (see below).

a. How many states are like California, which will withhold your registration if you don't comply with the recall?

Response: Vehicle owners who live in the 26 states with "enhanced" emissions inspection programs may be required to show proof that recall repairs have been completed prior to inspection. Of those states, 18 require diesel as well as gasoline vehicles to undergo inspections. Some states require proof that emissions recalls have been performed prior to issuing the vehicle registration.

11. According to the 2009-2011 EPA compliance report, manufacturers designed their vehicles to emissions levels "significantly below the level the standards allow."

According the report, VW vehicles were approximately 50% below the standard.

a. Since NOx emissions standards are based on fleet and not individual vehicles, has EPA determined that VW's fleet now exceeds emissions standards?

Response: Manufacturers are required to comply with both the fleet average NOx standard and a vehicle specific NOx standard selected by the manufacturer at the time of certification. Our investigation is ongoing, including investigating the impact of VW's use of the defeat device installed in the 2.0L VW vehicles on their fleet average NOx compliance.

12. EPA and CARB have stated that the defeat device results in on-road emissions of nitrogen oxides (NOx) that are 10 to 40 times higher than permitted by regulation. Please provide a detailed explanation or description of any assessments EPA has

conducted to evaluate the real-world effects of these emissions. In addition, please respond to the following questions:

Response: EPA cannot comment at this time due to the ongoing investigation.

a. Are these constant emissions or only under certain driving conditions?

Response: The 2.0L VW diesels are designed to have increased emissions under all driving conditions with the sole exception that when operated under the precise conditions of the Federal Test Procedures, the vehicles will have very clean emissions in order to appear to "meet" the emissions standards. The absolute level of excess emissions changes through different driving conditions. For example, emissions are higher driving uphill when compared to driving downhill. Emissions from the 2.0L vehicles generally are much higher in all real world driving.

b. What percentage of all U.S. domestic NOx emissions come from these vehicles, if they meet the standard?

Response: Our emissions models tell us that NOx emissions from light-duty diesel cars and trucks contribute less than 0.1 percent of NOx pollution from on-road vehicles. The fraction of U.S. domestic NOx emissions from all sources contributed by light-duty diesel vehicles is even smaller. The low contribution to NOx emissions from light-duty diesels is due to the relatively small number of light-duty diesel vehicles in the U.S. fleet, and to the small fraction of miles traveled by these vehicles compared to other vehicles. Light duty diesel vehicles comprise only about 1% of U.S. light duty vehicles. The vast majority of NOx from on-road vehicles comes from heavy-duty trucks and gasoline vehicles.

c. How does that change with use of this defeat device?

Response: EPA cannot comment at this time due to the ongoing investigation.

13. Please explain EPA's pre-production confirmatory testing. In addition, please respond to the following questions:

Response: Prior to submitting an application for certification, manufacturers test pre-production vehicles using EPA test procedures. Manufacturers submit the test data and documentation to EPA. Experienced EPA engineers and scientists review manufacturer data and other certification application materials, request additional evidence, and perform confirmatory tests on a portion of the vehicles before reaching a decision to approve or deny an application. EPA audits between 15 and 20 percent of the vehicle models manufacturers submit for certification, and conducts the confirmatory testing at its National Vehicle and Fuel Emissions Laboratory in Ann Arbor, MI.

a. Is this what the VW software was designed to defeat?

Response: It appears that the 2.0L software is designed to precisely recognize the test and to operate within legal limits during testing. The software directed the emission control system to operate properly during testing but to shut off critical emission control functions during all other operating modes.

b. It appears that manufacturers are also required to conduct a number of in-use tests over the life of the vehicle once in production: what tests do they conduct? Do these include on road tests?

Response: Manufacturers are required to test in-use vehicles under the mandatory In-Use

Verification program. These tests are performed on one and four year old vehicles at about 10,000 and 50,000 miles, respectively. They are required to conduct Federal Test Procedure (FTP), highway, US06, and, for gasoline vehicles, 2 day evaporative emissions tests (these are all conducted in laboratories). They are not required to perform on-road tests. Last year, manufacturers tested about 1,600 vehicles under this program.

i. What testing did VW conduct and did EPA review the results of these tests? Did they include on-road testing?

Response: VW conducted the required in-use testing which EPA reviewed as part of our normal process. This did not include on-road testing.

c. EPA conducts in-use surveillance testing once a vehicle is in production. How does that work?

Response: EPA has broad discretion to conduct tests to verify vehicle performance with the emission regulations. As part of its ongoing compliance oversight, EPA tests production vehicles to ensure that they match the certified design. EPA also conducts audits and employs a variety of other tools to check manufacturer compliance. EPA's in-use surveillance typically involves laboratory testing, but EPA has the authority to conduct over-the-road and other types of testing as it deems necessary. EPA conducts in-use vehicle surveillance testing at the National Vehicle and Fuel Emissions Laboratory in Ann Arbor, MI. The purpose of the EPA surveillance program is to assess emissions performance a few years after vehicles enter the fleet. EPA typically recruits two- or three-year-old vehicles from volunteers in southeast Michigan. EPA selects vehicles for surveillance both randomly and based on certification data, manufacturer in-use verification data, vehicle production volume, new technology, and public complaints and inquiries. EPA typically tests approximately 150 surveillance vehicles a year.

i. Did the EPA conduct in-use surveillance testing of any of the vehicles affected by this alleged defeat device?

Response: EPA conducted surveillance testing of 2010 and 2013 model year test groups including VW Golf, Jetta, and Beetle diesel vehicles.

1. If so, how were the vehicles tested?

Response: These vehicles were tested over the Federal Test Procedure, the highway fuel economy cycle, and the US06 cycle.

2. If not, why not?

Response: N/A.

14. When it was introduced on these vehicles, VW's clean diesel technology was considered advanced/novel. What did EPA do to understand their technology?

Response: Please see answers to Question #1 and #13. Further, EPA's Ann Arbor laboratory participated in several research partnerships and was deeply involved in the development of clean diesel technology in general. EPA's National Center for Advanced Technology (NCAT) was doing its own engineering and feasibility analysis of clean diesel technology in the early and mid-2000 time frame. The NCAT staff included experts with deep understanding of diesel technology.

Attachment 2-Member Requests for the Record

During the hearing, Members asked you to provide additional information for the record, and you indicated that you would provide that information. For your convenience, descriptions of the requested information are provided below.

The Honorable Tim Murphy

1. Who from EPA was involved in the conversations with CARB and VW when the appropriate recall solution to fix the excess emissions issue was being discussed?

Response: EPA cannot comment at this time due to the ongoing investigation.

The Honorable Morgan Griffith

1. After EPA has settled on an amount to fine VW, would it be appropriate for a portion of that fine to be given to West Virginia University for their efforts which helped discover the emissions deception?

Response: Civil penalties under the CAA are required by law to be directed to the Treasury.

The Honorable Kathy Castor

1. Has VW provided EPA with an engine map that shows specifically how the defeat device works for each model car in which it was installed?

Response: VW has provided EPA's Office of Transportation and Air Quality (OTAQ) a detailed description of the defeat device and examples of some of the engine maps from one model. This information has been requested by the Office of Enforcement and Compliance Assurance (OECA) under the provisions of section 208 of the Clean Air Act.

2. Please inform the Committee if VW does not provide EPA the results of their internal investigation.

Response: VW is expected to comply with all requests for information related to the ongoing investigation. However, EPA will inform the Committee if VW does not provide EPA with results of their internal investigation.